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BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

BRIAN R. SPACKMAN,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB No. 91-122

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

This matter involves Brian R. Spackman's appeal of the Department of Ecology's ("DOE") May 1, 1991, two thousand dollars (\$2,000) Order and Notice of Civil Penalty No. DE 91-E335, for failure to comply with DOE's Order No. DE 90-E325 issued June 6, 1990.

The Pollution Control Hearings Board held a formal hearing on October 3, 1991 in the Federal Courthouse, W. 904 Riverside Street, Spokane, WA. Member Annette S. McGee Presided during the hearing, and tape recorded the proceedings. The matter concluded on October 31, 1991, when closing briefs were filed. Lawyer Board Member Judith A. Bendor has reviewed the record.

Appellant Brian Spackman represented himself. Assistant Attorney General Ronald L. Lavigne represented the respondent, Department of Ecology (DOE). Proceedings were recorded by Court Reporter Louise M. Becker, Gene Barker & Associates, Olympia, Washington.

FINAL FINDINGS OF FACT,
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PCHB NO. 91-122

1 Witnesses were sworn and testified. Exhibits were admitted and
2 examined. Written closing arguments were filed on October 31, 1991.
3 From the testimony recorded, exhibits examined, and argument made, the
4 Board makes these:

5 FINDINGS OF FACT

6 I

7 Brian Spackman owns property along the Little Spokane River, in
8 Spokane County. He lives on the property, at 9915 Bridges Road, Elk,
9 Washington.

10 II

11 The Little Spokane River, a tributary of the Spokane River, is a
12 clean, rich stream with diverse high quality aquatic life. Overall,
13 it is aesthetically pleasing and nature abounds with wildlife in the
14 area. It is designated Class A Waters of Washington State.

15 III

16 Approximately, April 12, 1990, Spackman authorized and assisted
17 in the moving of construction machinery onto his property in
18 preparation for work in a marshy area adjacent to the River. The area
19 has cattails in it and is located within the floodline of the Little
20 Spokane River. The marshy area was separated from the River by logs
21 that formed a bank.

22 Areas such as this, serve to filter out sediments, thus
23 preventing them from reaching the river. These areas also serve to
24

1 keep the River water temperatures lower. The functions are important
2 in maintaining the River's suitability for aquatic and other life.

3 IV

4 Noticing the machinery, John H. McColgin from the Washington
5 Department of Wildlife stopped by and asked Spackman about it.
6 Spackman told him the equipment was for cleaning cattails from the
7 pond. McColgin asked him if he had permits for the work, and Spackman
8 said he didn't know he needed any. McColgin explained to him that he
9 did need permits, including a Hydraulics permit (HPA), and gave him
10 the names and telephone numbers of people at: the County for
11 shorelines and for floodplains, the Department of Ecology (DOE), and
12 the Department of Wildlife.

13 V

14 Spackman contacted Doug Adams, the County shorelines person, who
15 apparently offered to coordinate the permits. Spackman also spoke
16 with Brenda Sims with County floodplain. During part of the next
17 three weeks Adams was out of the office. No one else had been
18 assigned to do his work. Spackman found the situation frustrating.

19 During this time, the owner of the equipment was in the process
20 of selling it. Spackman was going to school full-time.

21 VI

22 In May, 1990, the dredge operator began to dredge in the
23 cattailed marshy area. The operator also moved the logs which
24 separated the marsh

1 from the River. A sediment control curtain was not used during the
2 dredging. The sediment laden waters of the marshy wetland area flowed
3 into the river, along with other sediments disturbed by the dredging.

4 Spackman contended that he was not aware of and did not authorize
5 the dredging. He said his house was separated from the pond by a hill
6 and trees. He was at school during the day and had not seen or heard
7 the work being done until the third day, when he came home early from
8 school.

9 VII

10 On May 18, 1990, Lawrence Neil Peterson, with the DOE's Eastern
11 Regional Office, responded to a downstream user's complaint call about
12 an excavation on the Little Spokane River. He inspected the site, saw
13 the excavation, silt deposits, and exposed mud in contact with the
14 River water. The otherwise clear River was muddy near the
15 excavation. Peterson took pictures and spoke with Spackman, who told
16 him that he didn't have any permits, and described his efforts to
17 obtain them. Peterson told Spackman that he was going to issue an
18 order to restore the area.

19 After returning to the office, Peterson discussed the episode
20 with others in the Department, and learned that another DOE employee,
21 Debora Cornett with the Shorelines Division, had earlier responded to
22 a call from another citizen downstream. The caller was concerned
23 about machinery that had been moved to an area along the Little
24
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1 Spokane River, near Elk. Cornett had inspected the site, taken
2 pictures and also talked to Spackman about the need for permits. She
3 then conveyed her concern to the Washington Department of Wildlife.

4 Subsequently, on May 18, 1990, the Department of Wildlife issued
5 a penalty of fifty dollars (\$50) to Spackman because the work had been
6 done without a hydraulics permit.

7 VIII

8 After consulting with the appropriate County authorities, Soil
9 Conservation Service, and State Wildlife, Peterson issued Order DE
10 90-E325 on June 6, 1990. The Order stated in part:

11 "... April 18, 1990 you authorized construction
12 activities ..." Exh. R-1

13 The Order required Spackman to:

- 14 1. Restore the site to its original condition to
15 the extent possible through a process of earth
and debris replacement and transplanting of
native vegetation on the site;
- 16 2. Conduct this work in accordance with plans and
17 specifications developed by a recognized firm,
organization or agency knowledgeable of stream
18 bank protection and construction techniques;
- 19 3. Submit the plans to this office [to DOE] prior
to June 22, 1990, for review and approval;
- 20 4. Complete revegetation of the site within
21 twenty (20) working days of Ecology
notification of plan approval. Exh. R-1;
22 Emphasis added.

1 The restoration had to be completed as soon as possible, to avoid
2 further water quality problems by minimizing the exposure of the soil
3 to the River water and to possible flooding.

4 Spackman has not contended that he appealed Order DE 90-E325
5 within 30 days of receipt.

6 IX

7 Following Order DE 90-E325's issuance, Peterson worked with
8 Spackman to develop a plan to be approved for the restoration. He
9 obtained the cooperation of the Spokane County Soil Conservation
10 Service (SCS) to draft a plan. Peterson visited the site again with a
11 SCS technician, along with communicating several times with Spackman.

12 DOE approved the restoration plan prepared by SCS on July 23,
13 1990, and sent Spackman a letter that day, informing him to proceed
14 with the work after obtaining a hydraulic permit from the Department
15 of Wildlife. Peterson had worked with Wildlife on the SCS restoration
16 plan, and he informed Spackman there would be no problem in obtaining
17 the hydraulics permit (HPA). In fact, the hydraulic permit was also
18 approved that day. In the DOE July 23, 1990 letter, Peterson also
19 stated he had obtained verbal approvals from Spokane County for
20 Spackman to proceed. Peterson further stated:

21 *With the HPA, you will be ready to go an [sic.] to*
22 *avoid penalty for failure to comply with the time limit*
23 *in the ORDER, you must move quickly on the project. I*
24 *anticipate making a compliance inspection during the*
third week in August. Your work should be completed
when I make that visit.

25 *If you have any questions, please feel free to contact*
me. Exh. R-2.

X

On August 21, 1990, Peterson visited the site and saw that the restoration was not started. He talked with Mrs. Spackman, communciating his concern, and telling her to have Spackman contact him immediately about the Order and the restoration.

After his August 21, 1990 site visit, Peterson waited for Spackman to contact him, but he did not do so. Instead, on August 21, 1990, Spackman's father-in-law, Robert Playfair wrote a letter to John Arnquist, the acting director of the DOE regional office. The letter was signed by Mr. Playfair, who states in the first sentence:

This is a letter I have had a difficult time bringing myself to write. Exh. A-2.

The Playfair letter outlined a plan which Mr. Playfair characterized as an "agressive plan" which might take several years up to fifteen years to complete. The author stated:

. . . truthfully the pond should have been later in the project but it is there so lets make the best of it. Exh. A-2.

DOE treated the letter as a citizen comment letter.

XI

On September 21, 1990, Peterson sent Spackman another letter. It stated:

As you are aware, I visited your property on August 21, 1990 and found that no work had been done to comply with your June 6, 1990 ORDER. I left word with your wife that it was very important for you to contact me. You have not made that contact.

1 I have contacted the State Attorney General's office
2 and we are discussing Ecology's next step in the
3 legal process. They suggested that I make final
offer allowing the opportunity for you to comply with
the substance of the original ORDER.

4 While a good faith effort at this later date would
5 not necessarily affect our deliberation over penalty
6 assessment for the existing infractions, it would
curtail the escalation of future enforcement actions
by this Department.

7 Your cooperation would be greatly appreciated.
8 Always, if you have any questions, please feel free
to contact me. Exh. R-3.

9 Spackman did not contact DOE at this time.

10 XII

11 In October, he was in court, and was ordered to pay the \$50
12 Department of Wildlife fine, and to not do any more work without
13 permits. He paid this fine.

14 In February 1991, he submitted another plan to DOE. It was a
15 development plan, providing for expanded excavation of the marsh-pond
16 to a size of 100 by 150 feet. The plan proposed withdrawal of water
17 from and discharge to the Little Spokane River.

18 Settlement negotiations occurred, but were not successful.

19 XIII

20 On May 1, 1991, DOE issued Penalty Order No. DE 91-E335 to Brian
21 Spackman (\$2,000), for failing to restore the site within 20 days of
22 the July 23, 1990, restoration plan approval notification. Spackman
23 appealed the May 1, 1991 Penalty Order to the Board, which became PCHB
24

1 No. 91-122.

2 On September 29, 1991, Spackman obtained a bid of \$6,250 for
3 planting cottonwood trees along the river site.

4 By the day of the hearing on October 3, 1991, the restoration had
5 not been done.

6 XIV

7 We find that Spackman knew the previous Order, DE 90-E325, was
8 intended to apply to the dredging done in May 1990, even though an
9 April date was in the Order.

10 Spackman stated that he did not do the restoration because he was
11 busy with school, he had injured himself, and the equipment that he
12 was going to use for restoration had broken down. He clearly
13 preferred not to restore the wetland, but to keep the open water
14 created for wood ducks and other purposes.

15 XV

16 The adverse environmental impact from Spackman's failure to
17 comply with Order DE 90-325 does not appear to be great. However, the
18 potential cumulative impacts, if others behaved similarly, would
19 likely be destructive to the River, its aquatic life, waterfowl, and
20 other wildlife in the area.

21 XVI

22 Any Conclusion of Law deemed to be a Finding of Fact is hereby
23 adopted as such.

24 From these Findings of Fact, the Board makes these:

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
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1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over the appeal of Order DE 91-E335.
4 Chapters 43.21B and 90.48 RCW.

5 II

6 In contrast, the Board does not have jurisdiction over Order No.
7 DE 90-E325, issued on June 6, 1990. It is undisputed that Order No.
8 DE 90-E325 was not appealed to this Board within 30 days of receipt.

9 We nonetheless note that RCW 90.48.080 provides:

10 *It shall be unlawful for any person to throw,*
11 *drain, run, or otherwise discharge into any of the*
12 *waters of this state, or to cause, permit or suffer*
13 *to be thrown, run, drained, allowed to seep or*
14 *otherwise discharged into such waters any organic or*
15 *inorganic matter that shall cause or tend to cause*
16 *pollution of such waters according to the*
17 *determination of the department as provided for in*
18 *this chapter. (Emphasis added.)*

19 It is undisputed that during the excavation, sediments were discharged
20 into the Little Spokane River. Such discharges tend to cause
21 pollution.

22 We further note that Chapt. 90.48 RCW is a strict liability
23 statute. CH20, Inc. v. DOE, PCHB Nos. 84-182 and 85-66 (1985).
24 Neither intent nor negligence is relevant. Id. See also, R.G. Leary
25 Construction v. Ecology, PCHB NO. 90-1 (1990), (general contractor
26 liable for subcontractor's unauthorized discharge of pollutants
27 because the general contractor mobilized the various tasks, and but for

1 those efforts the unlawful discharge would not have occurred). The
2 Pollution Control Hearings Board has concluded similarly in air
3 pollution cases, where property owners and prime contractors are
4 responsible for others' actions. See King v. PSAPCA, PCHB 88-59
5 (property owner responsible for allowing unlawful fires on their
6 property).

7 Spackman at the very minimum facilitated the activities by
8 authorizing the dredging equipment to be brought onto his property. As
9 such, he "permitted" or "suffered" the dredging which led to the
10 discharge of material to the River which tended to cause pollution.
11 RCW 90.48.080.

12 We note that Order DE 90-E325 erroneously cited dredging in April
13 1990. We have found that Spackman was aware that Order DE 90-E325 was
14 intended to apply to the May 1990 dredging. He therefore had notice.
15 City of Marysville v. Puget Sound Air Pollution Control Agency, 104
16 Wn.2d 115, 702 P.2d (1985).

17 III

18 In reviewing the appeal of Order No. DE 91-E335, the Board has
19 jurisdiction to determine these issues: 1) Did Spackman fail to comply
20 with Order DE 90-325's requirement to restore the area? 2) If so, is
21 the \$2,000 penalty reasonable?

22 IV

23 We conclude Spackman had violated Order No. DE 90-E325. As of
24
25

1 July 23, 1990, all the necessary approvals and permits had been
2 obtained. The restoration plan had been approved. He had 20 days to
3 complete the restoration. By August 21, 1990, 28 days later, no work
4 had even begun. Nor had the restoration begun by the date penalty
5 Order 91-335 was issued on May 1, 1991, or by the date of the hearing,
6 October 3, 1991.

7
8 V

9 The purpose of civil penalties is to promote compliance with the
10 law. RCW 90.48.144 authorizes civil penalties of up to \$10,000 per
11 violation per day. Appellant Spackman was only assessed \$2,000, even
12 though he had failed to comply for over eight months. He could have
13 been assessed a much larger penalty.

14 Several factors can be important in determining whether the
15 penalty is reasonable, including the scope and extent of the violation,
16 the maximum penalty possible, and the violator's conduct between the
17 time the violation occurred and when the penalty is assessed.

18 Northwest Processing, Inc. v. DOE, PCHB Nos. 89-141 and -142.

19 Appellant had almost nine months to comply with the restoration
20 requirement, yet failed to do so. We understand his wish to pursue
21 another approach, to create an open pond area for wood ducks. Some of
22 those projects might take several years to complete.

23 We have found that the environmental impact of his non-compliance
24 was not severe. Finding of Fact XV, above. But, we have also found

1 that there likely would be a severe cumulative environmental impact
2 along the Little Spokane River if other people chose to do what
3 Spackman did. Finding of Fact XV.

4 DOE provided extensive assistance to Spackman, yet he failed to
5 comply, letting months elapse between communication. DOE warned him
6 about a penalty for non-compliance. Spackman chose not to comply with
7 a lawful order, and instead offered plans for a bigger pond. As such,
8 he assumed the risk that a penalty would be issued. Settlement
9 negotiations were not successful.

10 Appellant suggests that his school work and his equipment
11 break-down should mitigate the penalty. If this were so, many people's
12 busy lives would stand in the way of compliance with lawful
13 environmental orders.

1 In view of all the factors, we conclude the \$2,000 penalty is
2 reasonable.

3 VI

4 Any Finding of Fact which is deemed a Conclusion of Law is hereby
5 adopted as such.

6 From these Conclusions of Law, the Board enters the following:

7 ORDER

8 Penalty Order No. DE 91-E335 for \$2,000 is AFFIRMED.

9 DONE this 8th day of January, 1992

10 POLLUTION CONTROL HEARINGS BOARD

11
12 Annette S. McGee
13 ANNETTE S. M^cGEE, Presiding Member

14
15 Judith A. Bendor
16 JUDITH A. BENDOR, Attorney Member